Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

WILBURT A. SIEGEL,
Petitioner,
VS.
JAMES ISLAND PUBLIC SERVICE DISTRICT; GEORGE W. FLYNN; GEORGE W. WITHAM; BARBARA M. LADSON; SYLVIA F. PETERS; JOHN B. BRYANT; NANCY H. HADLEY; RAY J. PATTERSON, JR.; constituting the membership of the Commissioners of the James Island Public Service District; ROBERT E. WELCH, Manager, James Island Public Service District; EDWIN B. QUINN, Wastewater Superintendent, James Island Public Service District; SINKLER & BOYD, PA; THOMAS C. HILDEBRAND, JR.; V. CLAIR ALLEN; STEPHEN E. DARLING; COUNTY OF CHARLESTON; WILLIAM T. HOWELL, Judge; J. ALTON CANNON, JR., Sheriff, Charleston County; ROBERT MILLER, Undersheriff, Charleston County; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; PARKER EVATT, Commissioner, South Carolina Department of Corrections; P. DOUGLAS TAYLOR, Warden of Lieber Correctional Institution,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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125

QUESTIONS PRESENTED

1. Is this "SEWERGATE" a novel issue where Siegel was seeking a safe sewerline and was prosecuted in both criminal and civil courts for the same offense?

2. Should there be certainty and stability in the law concerning an American citizen's/Siegel's liberty/ property rights in South Carolina?

3. Was public policy and/or police power within all of the Defendants' Jurisdiction/Statutory Authority in participating in Siegel's wrongful incarceration?

4. Did the United States Court of Appeals for the Fourth Circuit err in accepting the District Court's reasoning in dismissing all defendants prior to discovery and trial by jury, because Siegel is not in prison now?

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Comes now the petitioner, Wilburt A. Siegel, respectfully prays that a writ of certiorari issue to

review the Order of the United States Court of Appeals for the Fourth Circuit decided November 10, 1993, rehearing denied December 16, 1993, Mandate issued December 23, 1993.

OPINIONS AND ORDERS BELOW

The unpublished Order issued by the USCA Fourth Circuit on November 10, 1993, rehearing denied December 16, 1993, accepted the reasoning of the Charleston South Carolina District Court that my Complaint against all defendants for wrongful incarceration be dismissed prior to discovery because I am not in prison now, my case is without merit. A copy of the above Orders is submitted as Appendix "A" to this petition.

The Order of the South Carolina District Judge at Charleston

accepting the recommendation of the Magistrate Judge in dismissing all of the defendants prior to discovery and trial by jury is submitted as Appendix "B" to this petition.

The Charleston South Carolina Magistrate Judge's Report and Recommendation dismissing all defendants is submitted as Appendix "C" to this petition.

JURISDICTION

This petition is filed within ninety (90) days of the USCA Fourth Circuit's denial of rehearing. This Honorable Court's jurisdiction is invoked under the United States Constitution Article III, Section 2. paragraph 2. "...the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact...", and under 28 U.S.C. §1257(3).

RULE 14(i): The basis for federal jurisdiction in the court of first instance is FRCP §28-1343: Civil rights and elective franchise:

(a) The district courts shall have orginal jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

CONSTITUTIONAL PROVISIONS INVOLVED

The entire history of this "SEWERGATE" was reviewed in the Magistrate Judge's Report and Recommendation (App. "C") showing I have been prosecuted in criminal and civil courts for the same self-defense action...for the crime of being unable to connect to a raw sewerline installed in the highway drainage ditch, a breath away from the waterline that serves the entire community...this case involves a new issue - my wrongful incarceration.

The Magistrate Judge's Order cited the United States Constitution Art. III, Sec. 2 and Amendment XI as his reason for dismissal regarding State Circuit Judge Howell, the South Carolina Department of Corrections and officials. (App."D").

SIEGEL'S CONSTITUTIONAL PROVISIONS INVOLVED

I, South Carolina Inmate No. 153926 claim that the following Article and Amendments IV, V, VI, VII, VIII, IX and XIV (Appendix "E") to the beautiful United States Constitution sounds out clear and strong the guaranteed civil, legal and vested rights of liberty and property in America...that surely includes the State of South Carolina, the County of Charleston, the James Island Public Service District...yet, I have been denied in this long, wasteful, unnecessary SEWERGATE:

ARTICLE I Section 9

> "...No Bill of Attainder or ex post facto Law shall be passed."

STATUTORY PROVISIONS INVOLVED

As the Defendant James Island Public Service District through its elected commissioners, its employees, its attorneys claim as their authority for criminal and civil court action against their citizens to be:- Excerpt at Appendix: -

"F" ACT 498, 1961 (created James Island PSD, w/limited powers)

"G" South Carolina Code of Laws §6-11-1210, etc. (Sewage, etc.)

"H" James Island PSD Wastewater Use and Rate Resolution

"I" James Is.PSD Rules of Procedure

South Carolina Code of Laws: -

"J" §15-78-10 - Tort Law

"K" §24-3-10 - Prison System

"L" Hearing before Judge Sol Blatt regarding constitutionality of the penalty section of Act 498 and 6-11-1210, etc.

STATEMENT OF THE CASE

This case was filed in the Charleston South Carolina District Court after I was wrongfully incarcerated in a maximum security cell at a South Carolina State Penitentiary...Inmate Number 153926.

My crime was being unable to do the impossible - connect to an expen-ive-crushed-full-of-roots sewerline installed in the highway drainage ditch that I had pleaded to be corrected by the District for years.

State Judge ordered me to serve six (6) months definite time in the Charleston County Jail-Public Works.

Judge changed his mind.

.....Ordered me to serve six (6) months definite time in Lieber Correctional Institution; the Charleston County Sheriff to pick me up and transport me to Ridgeville,

South Carolina.

Next day the South Carolina Department of Corrections rejected me.

Strangely, the State Prison Guards "deposited" me back to the Charleston County Sheriff, at the downtown Charleston Courthouse.

Same angry State Judge wanted me returned to State Prison immediately.

.....Finally said Appeal.

.....Stayed his second Order of incarceration.

Judge changed his mind.

.....Abated his second incarceration order that was under appeal.

.....Resentenced $100/day fine to become a lien on property to inure to the benefit of the enterprise sewerline business owner, the James Island Public Service District.

My State Prison fingerprints, mug shot/records were destroyed be-

cause I was not supposed to be there.

In this present case the defendants brought forth the prior litigation over the past decade whereby the James Island Public Service District initiated arrest warrants that were declared unconstitutional by the General Sessions Judge; followed by the District filing a civil suit on the same sewerline. The United States District Magistrate Judge recited the events that led up to my wrongful incarceration in his Report and Recommendation.

Discovery was never scheduled for this case before the District Court in Charleston, yet, a decision to dismiss all Defendants was recommendated by the Magistrate Judge.

The Charleston District Judge accepted the Magistrate's Report and

Recommendation.

The United States Court of Appeals for the Fourth Circuit accepted the reasoning of the District Court that I was not in prison now and my complaint was without merit.

No oral argument was held at the Charleston, South Carolina District Court or the Fourth Circuit.

It is my prayer this Honorable Court will review the entire record and agree the Constitutional rights granted and guaranteed by our United States Constitution have been ignored by the Defendants shown in this petition for certiorari and you will find those in charge of our rights must act within their Jurisdiction and within the State of South Carolina's Statutory Authority, regarding wrongful incarceration.

May 18, 1992 I forwarded my Informal Brief, with Appendix number 1-8 to the United States Court of Appeals for the Fourth Circuit; the Appendix attempted to present this unbelievable SEWERGATE, as Appendix:

#1 PICTURES AND UNFAIR TREATMENT: (abandoned-crushed-full-of-roots sewerline, when unsigned Rule to Show Cause was served...11 years of being prosecuted to become "A SLAVE" to an engineering mistake...a sewerline in highway drainage ditch, not properly bedded, not properly covered, not permitted or inspected by DEHEC...a breath away from the Charleston City waterline)

#2 NEWS ARTICLES: JUSTICE SYSTEM IN SOUTH CAROLINA...(Publicity stunt: SIEGEL GOES TO JAIL IN SEWER LINE FIGHT...JIPSD filed

six cases the afternoon I was taken to prison, 100 CRR letters sent to "slackers" who failed to connect to a proper sewerline; STATE SPRINGS SIEGEL AFTER ONE DAY BEHIND BARS; GUILTY OF LIVING IN THE PSD; JUDGE, STATE AT ODDS IN SIEGEL CASE; etc.)

#3 JANUARY 12, 1989 HEARING BEFORE JUDGE WILLIAM T. HOWELL (he considered me a fugitive...the afternoon I was rejected from Lieber State Prison...wanted me returned to Lieber immediately; stayed Order and said Appeal)

#4 RECAP OF FORMER CASES: (Criminal and civil-same sewer)

#82-GS-10-1313 (arrest warrants declared unconstitutional)

#84-CP-10-3476 (Civil case on same sewerline)

#86-CP-10-0802 (Civil rights

Case: Transferred by the James Island Public Service District to Federal Court: #86-0775-8 - malicious prosecution and abuse of process...28 months later remanded back to State Court; same Judge Howell had already sentenced me to prison, he dismissed my civil rights case, granted JIPSD Summary Judgement)

#5 CALENDAR OF EVENTS (SEWERGATE)

12-06-68 thru 12-20-90

(From threatening letters to Criminal Arrest Warrants...to "cash offer"-keep secret, both Mr. and Mrs. Siegel sign away all past, present and future claims against the District, etc.;...to wrongful imprisonment;.....to $100/day fine-lien on property; all due to an improper sewerline)

#6 ENVIRONMENTAL ISSUES: (South Carolina-map-Cartoon accepting hazardous waste from other states, etc. Siegel is not a health hazard)

#7 March 20, 1991 (Transcript of Hearing before Magistrate Judge, Charleston South Carolina District Court... was familiar with the entire prior SEWERGATE. No discussion re: discovery)

#8 AUTHORITY OF DEFENDANTS (Lack of Public Policy, Jurisdiction and Statutory Authority...I was wrongfully incarcerated in a maximum security cell, in a state prison; because of the actions brought by a commercial enterprise business of collecting sewage, who enjoys complete autonomy...no oversight of the Public Service Commission)

FACTS

In 1968 we moved into our new home with an approved by the Health Department septic system, no trouble.

In 1979 I paid the required tap in fee and permit to become one of the first customers of the District's "wastewater collection system".

I have been seeking a proper, safe sewerline since the beginning of the installation in our neighborhood, but to this date have failed.

The James Island Public Service District installed some raw sewage lines in a swiss-cheese pattern in a portion of the District - with grants and loans from the Farmers Home Administration and the Environmental Protection Agency.

The District enjoys complete autonomy, no oversight from the

Legislative Delegation, Charleston County Council or the Public Service Commission in Columbia, S. C. that regulates rates for utilities.

The District's Use and Rate Resolution is so powerful that I was the first citizen to be served with a criminal arrest warrant "for failure to connect to a proper sewerline" when I was provided an improper sewerline.

The Charleston County General Sessions Court declared the arrest warrants to be unconstitutional and my criminal record expunged.

The James Island Public Service District then filed a Civil case on the very same improper sewerline... their same powerful Wastewater Use and Rate Resolution.

The District withheld the truth from the Court(s).

September 09, 1988: We observed an employee of the District attempting to replace the plug in the sewerline that empties into the manhole from the ditch-the sewerline had been ABANDONED; was crushed-full-of-roots for years; the District knew it as they kept returning to put cement in the ditch to hide the leak.

I had been prosecuted in both criminal and civil court for practicing "BUYER BEWARE". Common sense and knowledgeable people, including the manufacture of the very PVC pipe, said the installation was improper.

September 23, 1988: The South Carolina Department of Health and Environmental Control's Engineer stated DHEC's approval should have been obtained prior to any installation.

September 26, 1988: I waited two weeks. Nothing from the JIPSD

Commissioners or employees. I filed Motion to Vacate Injunction-Declare Order Void, pursuant to SCRCP #60(b) (4) and (5); with colored pictures of the abandoned sewerline.

I requested trial date from the Clerk of Court's office, was told my Motion would be placed on the upcoming Motion Calendar.

October 14, 1988: JIPSD served Rule to Show Cause, with an unsigned Order. Trial scheduled within four days, knowing there was no sewerline.

October 17, 1988: At 8:30 AM Siegel filed Motion to Quash Petition for Rule to Show Cause and Deny Order.

When copy of Siegel's Motion was given to Judge Howell's law clerk, JIPSD's attorney came with his Petition for Rule to Show Cause and Order for Judge Howell's signature;

trial scheduled for the next day fully knowing the sewerline had been abandoned and the Court had been fully informed by Siegel's Motions.

SAME MOMENT...JIPSD's contractor was at Bradford Avenue to remove the crushed-full-of-roots-sewerline they abandoned years ago...replaced with 19 feet of ductile iron but left PVC a breath away from the Charleston City waterline; in violation of all good engineering practice.

October 20, 1988: JIPSD served another Petition for RULE TO SHOW CAUSE, this time with a signed order by Judge Howell; contempt trial to be held October 26, 1988, within 6-days.

October 21, 1988: Siegel filed Supplement to Motion to Quash JIPSD's Petition for Rule to Show Cause; providing for the Court clear, colored pictures of the crushed-full-

of-roots-PVC sewer pipe the District knew was improper from the day it was improperly installed.

October 26, 1988: At the Trial Judge Howell allowed JIPSD's attorney to speak four pages of transcript but interrupted me after 1-minute of testimony, stating his hands were kinda tied and if he did not do something he would be held in CONTEMPT...if I could not afford the sewerline to move out of the house.

He found me in willful contempt.

SENTENCE: Six months in the Charleston County Jail - Public Works, effective December 26, 1988.

December 19, 1988: Charleston County Undersheriff Miller stated the Judge forgot to sign commitment papers, would get with us after the first of the year, when Judge returned to the Bench.

January 06, 1989: Judge Howell changed his first Order of Incarceration, now six months definite time at Lieber Correctional Institution. Undersheriff Miller called Siegel, would bring the Order with him when he picked me up on January 11th at 9:00 AM.

Mrs. Siegel offered to drive me to the Prison, but he said "No, the Judge Ordered we pick him up".

January 11, 1989: Charleston County Sheriff Cannon, Undersheriff Miller and deputies arrived at Bradford Avenue to take custody of WILBURT A. SIEGEL.

Sheriff transported me out of the County to Lieber State Prison where I was processed, mugged, fingerprinted, examined by female person, prison clothes issued, placed in a maximum security cell.

January 12, 1989: About noon I was told to change my clothes, was given my property (medicine bottle for another prisoner); put in a van, unknowing where I was being taken.

On I-26 the prison guards asked me if I knew the way to the Charleston County Jail. I was not accepted there. The drivers were instructed to take me downtown to Sheriff Cannon's office.

After four hours a hearing was held before a very angry Judge Howell with a very sick Inmate #153926 before him.

He believed I was a fugitive (I was surrounded by law enforcement officers). He wanted me returned to Lieber immediately.

Finally asked someone to appeal his Order and Stayed his January 6th order.

February 13, 1989: I was admitted to an acute care medical facility, in an attempt to survive the events that occurred and threatening phone calls.

February 16, 1989: Judge Howell held a status conference, abated the two prior orders that were under appeal, resentenced me (in my absence) to $100/day fine/lien on property to inure to the benefit of the James Island Public Service District.

The last sentence in Judge Howell's Order: "An additional status conference may be scheduled in the future". Judge Howell is not through with me yet.

If only I could shorten or erase all that has happened to me, but I cannot. The ulterior motive of the Defendants is apparent ... publicity; not the health of the District/State.

REASONS FOR GRANTING PETITION

The decision of the Charleston South Carolina Federal Court in dismissing all Defendants prior to discovery was made prior to the very important and relevant decision of this Honorable Court in LUCAS VS SOUTH CAROLINA COASTAL COUNCIL (112 S. Ct. June 29, 1992) at page 2902; Justice Kennedy concurring in the judgment:

> "The case comes to the Court in an unusual posture ... whatever may occur in the future cannot undo what has occurred in the past.
>
> ... It is well established that temporary takings are as protected by the Constitution as are permanent ones".

As discussed in the above case this Court determined that much fear in the police power of regulatory deprivation of property and how the Court's "takings" jurisprudence, on

citizens' historic understandings regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they take title to property. In this present case the Defendants have not proven the common-law maxim sic utere tuo ut alienum non laedas (use your property in such a manner as not to injure that of another).

Surely the "bundle of rights" that was discussed in the above case (page 2899) applies to a citizens's liberty as well as property. My wrongful imprisonment is surely as protected by the Constitution as permanent or long enduring imprisonment.

I was ordered to serve six months definite time in State Prison. The sentencing Judge lacked jurisdiction to select the Prison where my term would be served.

The Charleston County Sheriff and his deputies lacked jurisdiction to enter my home, transport me and deposit me out of the County.

I was wrongfully accepted by the State Prison. It took them some 28 hours to determine that statutory fact. (Appendix "K")

Yet, Judge Howell stated at the February 16, 1989 hearing that:

> "Gentlemen, as I have advised you, the purpose of this hearing today is in the nature of a status conference. As you are both aware, on the day after Lieber Institute sent Mr. Siegel back to Charleston they decided they were in error and they advised this Court that they were ready to receive him back.
>
> ...I notice Mr. Siegel is not here.
>
> ...I am hampered by the fact that I cannot pronounce a sentence on an individual who is not present in court. I will defer formal sentencing until that time."

Judge Howell changed his mind. He abated the wrongful incarceration orders and added the $100/day/fine to become a lien on property.

The Defendants were using me as a "YO-YO".

There is no certainity and stability in the law in the State of South Carolina when it comes to the liberty and property rights of an American citizen.

It should be axiomatic that a South Carolina State Judge must have the power to enforce its own Orders, prior to sentencing me to Lieber.

The James Island Public Service District, its Commissioners, its employees, its attorneys should have provided a proper sewerline prior to obtaining arrest warrants, civil cases, rule to show cause.

Oddly, the District was willing

to vacate their own Order, pay cash, Siegels sign away all past, present and future claims against the District, etc., to be kept secret; all the time knowing the sewerline was wrong.

This is surely a novel issue to bring before this Honorable Court, one without precedent, because the Defendants, individually or in concert did have an ulterior motive to have me incarcerated. They needed a whipping boy and found me.

Many citizens were not connecting to a "proper sewerline"...I was seeking one...unsuccessfully.

If a citizen paid the monthly sewer charge they were not required to connect to the sewerline.

I was not being billed.

Health of the District was never the issue.

U. S. CONSTITUTION-AMENDMENTS

APPENDIX "D"

Amendment XI: Was cited in the Charleston South Carolina District Magistrate's Report and Recommendation (Appendix "C") as the reason for dismissing Judge Howell, the South Carolina Department of Corrections and its officials; I feel is mistaken authority; as the State abolished sovereign immunity. (Appendix "J")

APPENDIX "E"

Amendment IV: "...the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.." has been violated by the Defendants in having me wrongfully incarcerated without jurisdiction.

As Amendment V: declares "No person shall...be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Yet, South Carolina State Judge Howell sentenced me in my absence on February 16, 1989...after making the remark that he could not and abated the two prior incarceration orders of six-months definite time; then ordering $100/day/fine/lien on property is a violation of Amendment V.

Amendment VI: provides "...to enjoy the right to a speedy and public trial, by an impartial jury..." surely applies to this instant case of wrongful incarceration, where all defendants were dismissed prior to discovery.

Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty

dollars, the right of trial by jury shall be preserved,..." has been violated by the Defendant District in their Wastewater Resolution declaring "not less than $100. a day" and by Judge Howell creating a fine in lieu of incarceration in my absence, to be a lien on property, to inure to the benefit of the JIPSD.

Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted" ... has been violated repeatedly throughout the record of this SEWERGATE.

Amendment IX: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" surely includes the right of privacy and enjoyment of our "golden years", as much as life and nature

will allow.

Amendment XIV: Thankfully such beautiful words brings all the hopes and dreams of every American citizen into focus; without which we would all perish and we would not be striving to sell this wonderful DEMOCRACY throughout the World...I pray for those rights to be granted me so that I may enjoy the freedom our relatives and friends gave their lives to preserve.

At Appendix "H" the James Island Public Service District's Use and Rate Resolution requiring connection to their sewerline is a violation of Article I Section 9: "...No bill of Attainder or ex post facto law shall be passed."

In 1867 the United States Supreme Court discussed in CUMMINGS VS STATE OF MISSOURI (71-0356): -

> "An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed".

As so well stated in the wonderful book "Rebirth of our Nation", Author - Dr. Donald Howard, (page 150, printed with permission):

> "When Constitutional Law becomes subordinate to administrative law, it is our moral obligation as American citizens to be willing to bear the expense of contesting the validity of that administrative law in the Courts.
>
> If it is not contested, it will become a permanent fixture in government and a tyranny to yet unborn generations".

Surely this Nation does not provide that an American Citizen be wrongfully imprisoned, his estate be seized for the "CRIME" of failure to connect to an "improper" public sewerline; which would cause trouble.

At Appendix "F" Act 498 created the James Island Public Service District...powerful authority to take a citizen to criminal court, seek unlimited fine or imprisonment, as:

> SECTION 9.
> States: Penalties.-
> Any person, firm or corporation, wilfully failing or refusing to comply with any rule or regulation of the Commission promulgated or adopted under authority duly vested in it, after written notice of such rule or regulation and demand for compliance therewith, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding twenty-five dollars or imprisonment of not exceeding ten days; provided, that each day after conviction of such failure or refusal to comply that the same shall continue shall constitute a separate offence, and be subject to like punishment.

That law was declared unconstitutional by the General Sessions Court, as it was not a

General Law but Federal Judge Sol Blatt (Appendix "L") ruled it was constitutional and not superseded by South Carolina Code of Laws §6-11-1210, etc. (Appendix "G").

That leaves a citizen at the mercy of any whim or Resolution a commercial operation such as the wastewater collection system cares to invent. (Appendix "H" and "I")

At Appendix "J" is excerpt from South Carolina Code of Laws §15-78-10, known as the "Tort Claims Act", effective July 1, 1986 whereby the public policy of the State waives soverign immunity.

The facts before this Court shows there is a case or controversy and I do not lack standing to seek help from the Federal Court.

As the Defendants lacked jurisdiction to participate in the

actions that led to my wrongful incarceration by ignoring the South Carolina Code of Laws §24-3-10, etc. (Appendix "K") whereby the designate place of confinement of prisoners in the State of South Carolina is determined by the Prison Officials - not a Judge or Sheriff.

Yet, the Defendants acted under color of state law. As a citizen of the United States I should be able to maintain a §1983 suit against them.

I feel the applicable case law to be HAFER VS MELO, et al (112 S. Ct. 358, 60 US LW 4001): Justice O'Connor delivered the opinion:

> In WILL V. MICHIGAN DEPT. OF STATE POLICE, 491 U.S. 58 (1989), we held that state officials "acting in their official capacities: are outside the class of "persons" subject to liability under 42 U.S.C. §1983. 491 U.S. at 71. Petitioner takes this language to mean that §1983

> does not authorize suits against state officers for damages arising from official acts. We reject this reading of WILL and hold that state officials sued in their capacities are "persons" for purposes of §1983. (11-05-91).

When the Fourteenth Amendment to the United States Constitution was just a teenager the case of YICK WO V. HOPKINS, SHERIFF, etc. (118th U.S. 356, May 10, 1886) (Supreme Court Reporter page 1064-1073) concerned Constitutional Law - Ordinances - Wrongful imprisonment; MATTHEWS, J.: -

> The ordinances vesting in the board of supervisors (County and City of San Francisco)...not a discretion to be exercised upon the consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only to places, but as to persons.
>
> ...The power given to them is not confided in their discretion in the legal

sense of that term, but is granted to their mere will.

It is purely arbitrary, and acknowledges neither guidance nor restraint.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.

And the law is the definition and limit of power. ...in the famous language of the Massachusetts bill of rights, the government of the Commonwealth "may be a government of laws and not of men".

May I ask of this Court to consider the case of DeSOUTO VS COOKE, et al, re: Prison Officials (751 F. Supp. 794 (E.D. Wis. 1990):

> Motion to dismiss under FRCP 12(b)(6):
> Page 797: ..."Founded upon an awareness of applicable law, as undoubtedly many pro se complaints are, and constrained by instructions unique to pro se litigant, even a legitimate claim may be fodder for a motion to dismiss".
>
> Page 799: "At this early stage in the action, the Court is not satisfied that Mr. DeSouto's allegations, liberally construed and taken to be true, fail to state a claim entitling him to relief under the 14th Amendment and #1983".

The facts are clear and can be proven beyond a doubt at trial. I have been deprived of my freedom to enjoy life in America; as much as life and nature will permit.

This case should be allowed to proceed to discovery and jury trial.

CONCLUSION

As the United States Court of Appeals for the Fourth Circuit accepted the Court at Charleston South Carolina's dismissal of all defendants, I feel it was premature as the Defendants would not reply to my interrogatories, discovery should be accomplished.

This Court made the decision in LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (112 S. Ct. 2886 (1992) that proves the State of South Carolina can err in their regulatory powers, as is true in this instant case.

The record shows the Defendants' actions were without jurisdiction, they abandoned common sense, and certainly abandoned Common Law; not in the interest of the health and welfare of citizens.

RELIEF SOUGHT

This case certainly presents obstruction of justice that should not be tolerated in America.

With the facts presented I pray this Honorable Court will grant my petition for writ of certiorari, as the lower Courts decided this case in conflict with Constitutional rights and resolved this novel issue in an erroneous manner.

Submitted in respect for the Laws of this Nation,

Wilburt A. Siegel

Wilburt A. Siegel, Petitioner
1058 Bradford Avenue
Charleston, SC 29412
Phone: 803-795-8586

March 11th, 1994

APPENDIX "A"

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Wilburt A. Siegel, Plaintiff-Appellant

v.

James Island Public Service District,

et al, Defendants-Appellees.

No. 92-1204

Appeal from the United States District

Court for the District of

South Carolina, at Charleston.

Solomon Blatt, Jr.,

Senior District Judge.

(CA-91-6)

Submitted: November 6, 1992

Decided: November 10, 1993

Before WIDENER and HALL,

Circuit Judges, and

SPROUSE, Senior Circuit Judge

(Rehearing denied: December 16, 1993

Mandate: December 23, 1993)

Affirmed by unpublished per curiam opinion.

COUNSEL

Wilburt A. Siegel, Appellant Pro Se. Stephen Peterson Groves, Sr., Carol Brittian Ervin, YOUNG, CLEMENT, RIVERS & TISDALE, Charleston, South Carolina; David Brian McCormack, BUIST, MOORE, SMYTHE & McGEE, Charleston, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Wilburt A. Siegel appeals from the district court's order denying relief under 42 U.S.C. #1983 (1988).

Our review of the record and the district court's opinion accepting the recommendation of the magistrate judge discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Siegel v. James Island, No. CA-91-6 (D.S.C. Jan. 14, 1992). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid in the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Wilburt A. Siegel, Plaintiff-Appellant

v.

James Island Public Service District, et al, Defendants-Appellees

FILED

December 16, 1993

No. 92-1204

CA-91-6

O R D E R

The appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Bert M. Montague

Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Wilburt A. Siegel, Plaintiff-Appellant

v.

James Island Public Service District,

et al, Defendants-Appellees

FILED

December 23, 1993

No. 92-1204

CA-91-6

M A N D A T E

The judgment of this Court dated 11/10/93 takes effect today.

BERT M. MONTAGUE

CLERK

APPENDIX "B"

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

C/A 2:91-0006-8J January 14, 1992

THE HONORABLE SOL BLATT, JR.

WILBURT A. SIEGEL, Plaintiff

vs

JAMES ISLAND PUBLIC SERVICE DISTRICT, et al, Defendants

This pro se civil rights case is before the court on the defendants' motions to dismiss, or in the alternative, for summary judgment. The record includes the report and recommendation of United States Magistrate Judge Robert S. Carr in which he recommends that the defendants' motions to dismiss be granted. The parties were given notice of the right to file objections to the magistrate judge's

report and notice of the consequences for the failure to do so; in response, the plaintiff filed timely objections.

The report and recommendation of the United States magistrate judge was made in accordance with 28 U.S.C. #636 and the local rules of this district concerning reference to a magistrate judge. See United States Magistrates, Local Rule 19, D.S.C.; Social Security Cases, Local Rule 20, D.S.C.; Bowman v. Bordenkircher, 522 F. 2d 209 (4th Cir. 1975). Under 28 U.S.C. #636(b),

> (a) judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further

> evidence or recommit the matter to the magistrate judge with instructions.

Absent timely objection from a dissatisfied party, a district court is not required to review, under a de novo or any other standard, a magistrate judge's factual or legal conclusions. Thomas v. Arn, 474 U.S. 140, 150, 106 S. Ct. 466, 472 (1985). Here, the plaintiff filed objections to the magistrate judge's report. However, after reviewing this matter de novo, the court finds that the magistrate judge properly resolved the issues presented herein and that the plaintiff's objections are without merit; therefore, the magistrate judge's excellent report and recommendation, replete with what this court feels are appropriate and correct factual findings and legal conclusions, granting the defendants'

motions to dismiss is hereby adopted as the order of this court.

IT IS SO ORDERED.

s/Sol Blatt, Jr.

UNITED STATES DISTRICT JUDGE

January 10, 1992

Charleston, S.C.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Case Number: C/A 2:91-0006-8J

THE HONORABLE ROBERT S. CARR,

Magistrate Judge

Entered August 09, 1991

WILBURT A. SIEGEL, Plaintiff

vs

JAMES ISLAND PUBLIC

SERVICE DISTRICT, ET AL

Defendants

REPORT AND RECOMMENDATION

This pro se civil rights complaint brought pursuant to 42 U.S.C. #1983 is before the undersigned United States Magistrate Judge for a report and recommendation on all defendants' motions to dismiss or in the alternative for summary judgment. 28 U.S.C. #636(b).

In this lawsuit, the Plaintiff, Wilburt A. Siegel (Siegel), seeks redress for alleged constitutional violations committed by the defendants during their participation in the decade long attempt by the defendant James Island Public Service District's (the District) to have Siegel connect his James Island home to the District's sewer system as required by the District's Wastewater Collection Regulation passed March 26, 1979. Siegel has refused to connect his home at 1058 Bradford Avenue, James Island, South Carolina, to the system because he believes that the sewer system is unsafe, unhealthy, and otherwise improper.

A brief history of the prior litigation between the District and Siegel is necessary to an understanding of the instant action.

In 1982, a bench warrant had been issued by the Honorable William Simmons, Chief Magistrate for Charleston County, pursuant to an affidavit filed by the District stating that Siegel had failed to connect to the sewer system in violation of the Wastewater Resolution. The affidavit was ultimately served on Siegel. A trial was held before Magistrate Simmons and Siegel was found guilty of failing to tie into the sewer system.

Siegel appealed that decision to the Charleston County Court of Common Pleas. The Honorable Lawrence E. Richter, Jr., South Carolina Circuit Judge, reversed Siegel's conviction, holding that the penalty provision of 1961 Act, No. 498, was unconstitutional because it was a special law and had been displaced by

a general law. S. C. Code Ann. #6-11-1250 (Law. Co-op. 1976). Section 6-11-1250 provides for a mandatory injunction requiring a citizen to connect to the system. The South Carolina Attorney General's Office and the Ninth Circuit Solicitor's Office decided not to appeal Judge Richter's Order.

Litigation next commenced between the District and Siegel in the Charleston County Court of Common Pleas on November 28, 1984. The District filed an action, No. 84-CP-10-3476, seeking a mandatory injunction to compel Siegel to connect to the District's sewer system.

A hearing was held on the District's motion for a mandatory injunction. Siegel presented oral argument to Judge Edward

B. Cottingham, South Carolina Circuit Judge, that the sewer system was unhealthy and further that is was not technically feasible for him to tie into the system. Judge Cottingham issued his order requiring Siegel to tie into the District's sewer system at his own expense within thirty (30) days of his receipt of a copy of the order dated March 3, 1986.

Siegel appealed Judge Cottingham's order and the South Carolina Court of Appeals affirmed the trial court's decision in a memorandum opinion. Mem.Op. 87-MO-023, March 9, 1987. In light of the Court of Appeals' decision, judgment was entered against Siegel in the Charleston County Court of Common Pleas on March 25, 1987.

Thereafter, William T. Howell, South Carolina Circuit Judge, issued

a rule to show cause and order on the District's motion requiring Siegel to appear before the court to show why he should not be held in contempt for failing to comply with Judge Cottingham's order. A hearing was convened on the rule to show cause on October 26, 1988, at which time the parties appeared and presented oral argument to Judge Howell. On November 1, 1988, Judge Howell issued an order denying Siegel's motion to vacate Judge Cottingham's order and denying Siegel's motion to quash the rule to show cause. Further, Judge Howell found Siegel in contempt of the March 25, 1987 Order of Judgment for his willful failure to tie into the sewer system and sentenced him to six (6) months in jail, providing, Siegel was given (60) days to comply with the contempt order by properly

tieing into the District's sewer system.

Siegel then filed a Writ of Supersedeas in the South Carolina Supreme Court to stay Judge Howell's contempt sentence. The court denied the petition by order dated December 16, 1988.

Judge Howell modified his earlier order on January 6, 1989, and directed Siegel to begin serving his six (6) months term on January 11, 1989. Siegel was transported by the Charleston County Sheriff's Department to Lieber Correctional Institution where he spent one (1) night. Judge Howell then stayed the plaintiff's sentence until another hearing could be held. The next hearing was convened on February 16, 1989, at which time, plaintiff's attorney requested that the judge

enter a new order for contempt and abate the incarceration order because of Siegel's poor health as a result of cancer. Judge Howell revised his order and substituted a one hundred ($100) a day fine in lieu of incarceration. A written order was signed by Judge Howell on February 28, 1989. Siegel is still in contempt.

In February, 1986, Siegel instituted a state court suit against the District arising out of the events dating back to 1982. (Case No. 86-CP-10-802). He alleged abuse of process and malicious prosecution, false arrest, and violation of 42 U.S.C. #1983. Siegel alleged that the District acted improperly in pursuing a misdemeanor complaint in magistrate's court against him for his failure to connect to the

system. He alleged that the District allegedly knew or should have known that the District's enabling act, 1961 Act. No. 498, #9 (penalty section), was unconstitutional.

The defendant District removed the case to federal court. The Honorable Sol Blatt, Jr., United States District Judge, granted the District's motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure on the #1983 claims, holding inter alia, that the 1961 Act, No. 498 and South Carolina Code Annotated #6-11-1250, 1251, were constitutional. Siegel did not appeal the dismissal. The remaining state law claims were remanded to state court, and the District was subsequently granted summary judgment on those claims by Judge Howell on December 29, 1988.

In his instant complaint filed January 3, 1991, Siegel asserts that the defendants acting under color of state law either negligently or intentionally caused him to be wrongfully incarcerated and later subject to a one hundred ($100) dollar a day fine to become a lien on his property to inure to the benefit of the District in violation of his constitutional rights. Siegel asserts that all defendants "independently or in concert, did cause plaintiff Siegel to be wrongfully incarcerated, processed, mug, finger printed, hurtful physical examination, held in maximum security, transported by state prison guards to places unknown, causing infliction of mental and emotional distress, real and extreme mental disturbance, humiliation, publicity;

cruel and unusual punishment; all intentional interference with the person of plaintiff Wilburt A. Siegel." (Complaint, Paragraph 9). He claims that "the state, its court, its employees, its elected officials, and its agencies are given unbridled authority under South Carolina Code of Law, #6-11-1250, to violate the civil and legal rights of the citizens of the United States residing within the domain of the James Island Public Service District, Charleston County; without due process of law as guaranteed by the United States Constitution." (Complaint, Paragraph 11). Additionally, "the South Carolina Department of Corrections prison policy and the Charleston County judge's order of incarceration are suspect, unclear, and in violation of

civil and legal rights guaranteed to all citizens of the United States." (Complaint, Paragraph 13).

He alleges that his rights under the fourth, fifth, sixth, seventh, eighth, and ninth amendments to the United States Constitution have been violated by the defendants and seeks a declaratory judgment that South Carolina Code Annotated #6-11-1250 (Law. Co-op. 1976), as well as the James Island Public Service District's Wastewater collection use and rate schedule, are violative of due process rights under the United States Constitution. Siegel also wants this court to render "a determination of the procedure of a county judge to specify location of incarceration for citizen" (sic) as well as "a determination of the procedure of the South Carolina State

Department of Corrections accepting a citizen and then returning same to the Charleston County Sheriff." He also seeks actual and punitive damages.

All defendants have filed motions to dismiss or in the alternative for summary judgment. Rules 12 and 56, Fed.R.Civ.P. On February 22, 1991, a copy of the various motions to dismiss and supporting memorandum were provided to the plaintiff along with an explanation of dismissal and summary judgment procedures as well as a copy of pertinent extracts from Rules 12 and 56 of the Federal Rules of Civil Procedure similar to that required by Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). The plaintiff has responded by filing a memorandum in opposition to all motions. He has

also filed transcripts of all court proceedings complained of as well as exhibits of photographs of the condition of the sewer system, opinions of various engineers and others of the condition of the sewer system, and in general, all materials which related to the prior decade long dispute. A hearing was convened before the undersigned on March 20, 1991, at which time, Siegel and attorneys for the defendants were present. At the hearing, the parties agreed that the various motions to dismiss would be decided on the moving papers and memorandum without oral argument. Thus, it appears that these matters are ready for consideration.

A review of the record and relevant case law indicates that the defendants' motions to dismiss should

be granted.

STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the reviewing court must presume all factual allegations contained in the complaint to be true. Miree v. DeKalb County, Georgia, 433 U.S. 25, 97 S.Ct. 2490 (1977). A presumption of truthfulness is not accorded to legal conclusions and opinions framed as factual allegations. Davidson v. State of Georgia, 662 F. 2d 895 (5th Cir. 1980) (where allegations of unconstitutionality are wholly conclusory, dismissal was proper); Bryan v. Stillwater Board of Realtors, 578 F. 2d 1319 (10th Cir. 1977) (conclusions or opinions are not deemed admitted for purposes of a 12(b)(6) motion).

A 12(b)(6) motion should be granted if an affirmative defense is apparent from the face of the complaint. Further if the allegations of the complaint demonstrate that the defendant enjoys absolute immunity from the claims asserted, dismissal is required. Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1976).

Section 1983 provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in action at law, suit in equity, or proper proceeding for redress."

42 U.S.C. #1983. Section 1983 was enacted to override certain kinds of state laws, to provide a remedy where state law was inadequate, to provide a federal remedy where state remedy though adequate in theory was not available in practice, and to provide a remedy in federal court supplementary to any other state remedy. Monroe v. Pape, 365 U.S. 167 (1961), overruled in part, Monell v. Dept.of Social Services, 436 U.S. 658 (1978). This section simply creates a cause of action and is not jurisdictional. Hagans v. Levine, 415 U.S. 528 (1974). It provides no substantive rights, only a remedy. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).

The burden is on the plaintiff asserting a deprivation of federally protected rights to show that a

substantial federal question exists in order to confer jurisdiction. Goldsmith v. Mayor of Baltimore, 845 F.2d 61 (4th Cir. 1988). A claim is insubstantial if it is obviously without merit or clearly foreclosed by authoritative precedent. Hagans v. Levine, 415 U.S. 528 (1974); Crosby v. Holsinger, 816 F. 2d 162 (4th Cir. 1987).

JAMES ISLAND PUBLIC SERVICE DISTRICT

Siegel has sued the James Island Public Service District and George W. Flynn, George W. Witham, Barbara M. Ladson, Sylvia F. Peters, John B. Bryant, Nancy H. Hadley, Ray J. Patterson, Jr., constituting the membership of the Commissioners of the James Island Public Service District, and Robert E. Welch, its Manager, as well as Edwin B. Quinn, its Wastewater Superintendent.

Siegel's underlying theory of his claims against these defendants is that they acted improperly in pursing a complaint against him for his failure to connect to the sewer system. He asserts that they "caused" him to be incarcerated.

A review of the plaintiff's complaint and Judge Howell's order indicate that Judge Howell found Siegel in contempt of court for his willful failure to tie into the system. Siegel's incarceration was pursuant to an order of Judge Howell, not pursuant to the District's order. Judge Howell allowed Siegel sixty (60) days to tie into the system and then determined in his discretion that incarceration was the appropriate sanction for Siegel. As a matter of law, the District lacks the authority to cause the plaintiff

to be transported or incarcerated. The complaint fails to state any facts to the contrary. Therefore, these defendants are entitled to dismissal of Siegel's action against them.

Second, in relation to the District, Siegel claims that the Wastewater Resolution and South Carolina Code Annotated #6-11-1250 are unconstitutional and asks this court to declare them unconstitutional.

In response, the District raises the affirmative defense of res judicata, which may be raised by means of a Rule 12(b) motion particularly if it appears from the face of the complaint and documents from the public record. Fletcher v. Bryan, 266 F.2d 72 (4th Cir. 1959), Mann v. Peoples First National Bank & Trust Co., 209 F.2d

570 (4th Cir. 1954); Ellis v. Cates, 178 F.2d. 791 (4th Cir. 1952).

In order to properly maintain a defense of res judicata, the defendant must show that the issue in the present action is identical to the one decided in the prior proceeding, that the prior litigation reached a final judgment on the merits, and that the party against whom the plea is asserted was a party, or in privity with a party, to the prior adjudication. Blonger-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402 U.S. 313, 323-324 (1971).

Siegel has argued that these statutes are unconstitutional in the prior state court action. Siegel v. James Island Public Sewer District, Cause of action No. 86-CP-10-802. It appears from the record

that a full, fair, and reasonable opportunity to litigate those issues was presented Siegel and the District. Siegel alleged that the District's enabling Act, 1961 Act, No. 498, was unconstitutional and further that no such criminal charges could be brought under 1965 Act., No. 397. That Act is codified as South Carolina Code Annotated #6-11-1250 et. seq. The case was removed to federal court where the Honorable Sol Blatt, Jr. granted the District's motion to dismiss the #1983 claims holding that 1961 Act No. 498, and South Carolina Code Annotated #6-11-1250, 1251 were constitutionl statutes. No appeal was taken from the holding. Judge Blatt's order remains the law of the case.

After the state law claims were

remanded to state court, Judge Howell cited Judge Blatt's constitutionality finding to defeat Siegel's malicious prosecution and abuse of process claims:

> "There is no basis to support the plaintiff's claim that the District should have known from this language that a judge would later rule that #9 of Act No. 498 was unconstitutional. Indeed, Federal District Court Judge Sol Blatt, Jr., has reviewed the provisions in question and held them to be constitutional ..."

Siegel appealed Judge Howell's order granting summary judgment and the constitutionality of South Carolina Code Annotated #6-11-1250 was again addressed. The South Carolina Supreme Court affirmed the trial court's order of summary judgment and denied Siegel's petition for a rehearing on January 25, 1991. S.C. Supreme Court Op. No. 90-MO-323.

In summary, the issue of the constitutionality of these statues has been litigated and upheld before both state and federal judges. Siegel should not be allowed to relitigate these issues which have been actually litigated and directly determined. The defense of res judicata is applicable and entitles the James Island Public Service District and the defendants associated with the District to dismissal from the action.

SINKLER & BOYD, P.A.

Siegel has also sued the law firm of Sinkler & Boyd, P.A. (the Sinkler firm) and its predecessor firm, Sinkler, Gibbs & Simons, as well as individual attorneys, V. Clair Allen, Stephen E. Darling, Thomas C. Hildebrand, Jr., the law firm's employees. The Sinkler firm

represented the defendant District for many years. In 1984, the firm was retained by the District to institute an action against Siegel. Next, the Sinkler firm filed, at the direction of the District, a rule to show cause after Siegel failed to comply with the March 25, 1987 order of judgment.

A review of the record and relevant case law indicates that the Sinkler firm defendants should be dismissed from the action because the plaintiff cannot demonstrate that they were acting "under color" of state law.

The sine qua non of a civil rights action is state action under the fourteenth amendment. West v. Atkins, 487 U.S. 42 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). State action is present if

the conduct allegedly causing the constitutional deprivation may be fairly attributed to the state. West v. Atkins, 487 U.S. 42 (1988). A two-factor test is used to determine "fair attribution":

> a. Exercise of right created by state: the deprivation is caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.
>
> b. And by a state actor: party charged with deprivation must be a state actor, that is, must be a state official, or has acted together with a state official, or engaged in conduct that is otherwise attributable to the state.

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

The Sinkler firm is a private law firm which had been retained by the District to represent the District. The individual lawyer

defendants were members of that firm. There is no indication that the relationship between the Sinkler firm and the District is one other than that of attorney-client; it is a contractual matter and is governed by the same principles that govern the firm's relationship with its other clients, Siegel's conclusory allegations otherwise notwithstanding. Hence, actions taken by the firm in this matter were those of a private law firm acting on behalf of its client. And while an attorney who conspires with state officials to violate constitutional rights acts under the color of state law, Tower v. Glover, 467 U.S. 914 (1984), a plaintiff cannot resist a motion to dismiss by doing nothing more than making naked assertions of conspiracy. Phillips v. Washburn,

746 F. 2d 782 (11th Cir. 1984).

In short, these defendants acted as privately retained counsel for the purpose of initiating certain legal proceedings on behalf of their client, the District. Such action does not constitute action taken under color of state law for #1983 purposes. Hence, these defendants are entitled to dismissal of the complaint against them for failure to state a claim.

JUDGE HOWELL

Judge William Howell has moved for dismissal asserting that the action is barred against him by the doctrine of absolute judicial immunity. A review of the record and relevant case law indicates that Judge Howell is entitled to dismissal as a result of this defense.

On the face of his complaint,

Siegel acknowledges that Judge Howell had jurisdiction of his cases pursuant to South Carolina Code of Laws #6-11-1250. (Complaint pg. 11). Further, it is undisputed that Siegel's claim against Judge Howell arises out of acts Judge Howell took in his judicial capacity.

The United States Supreme Court early recognized that it was of highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, "(should) be free to act upon his own convictions without apprehension of personal consequences to himself." Bradley v. Fisher, 13 Wall. 335, 347, 20 L.Ed. 646 (1872). Siegels' disagreement with Judge Howell's order does not strip Judge Howell of his absolute judicial immunity. The immunity

applies "however erroneous the act may have been and however injurious in its consequences". Id. at 347.

The United States Supreme Court has held that this common law absolute immunity of judges for their judicial acts shielded them in #1983 litigation. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1967).

Next, reading the pro se complaint liberally, it appears that Siegel may be requesting declaratory or injunctive relief in his prayer for "a determination of the procedure of a county judge to specify location of incarceration for citizens." (Siegel Complaint, Paragraph 4). In this regard, it appears that Siegel lacks standing to seek such relief and this court lacks jurisdiction to hear it. U.S. Const. Art. III, #2. The judicial power of the federal

courts is limited to adjudication of cases or controversies. A case or controversy exists depending on "whether the plaintiff seeking relief has alleged a sufficient personal stake in the outcome to assure that the court will be called upon to resolve real issues between genuine adversaries rather than merely give advisory opinions with respect to abstract or theoretical questions". Fowler v. Alexander, 478 F. 2d 694 (4th Cir. 1973), quoting, Abele v. Markle, 452 F.2d 1121, 1124 (2nd Cir. 1971). Siegel indicates in his complaint that he is no longer incarcerated or under an order of incarceration. Even read liberally, it is unclear what real or immediate threat he perceives. Therefore, Siegel lacks standing to raise this issue.

COUNTY OF CHARLESTON,

J. ALTON CANNON and ROBERT MILLER

The defendants, County of Charleston, J. Alton Cannon, Jr., County Sheriff, and Robert Miller, its undersheriff, moved to dismiss the complaint for failure to state a claim upon which relief can be granted for the reason that their alleged wrongful conduct was pursuant to a judicial order and, therefore, these defendants are immune from liability by virtue of derivative judicial immunity.

These defendants' motion is well taken and should be granted. Siegel was transported to and from prison and jail and processed pursuant to Judge Howell's order and, therefore, they enjoy derivative judicial immunity for their actions. See, McCray v. Maryland, 456 F.2d 1 (4th

Cir. 1972); Lockhart v. Hoenstine, 411 F.2d 455 (3rd Cr.), cert. denied, 396 U.S. 941 (1969).

SOUTH CAROLINA

DEPARTMENT OF CORRECTIONS

Siegel contends that defendant South Carolina Department of Corrections, its Commissioner Parker Evatt, and the Warden of Lieber Correctional Institution P. Douglas Taylor, violated his constitutionally protected rights when Siegel was incarcerated at Lieber Correctional Institution on January 11, 1989. It appears that these defendants are subject to dismissal from the action because the suit is barred by eleventh amendment of the United States Constitution and this agency and these state officials acting in their official capacities are not "persons" within the meaning and

scope of #1983.

It is undisputed that the Department of Corrections is a state agency and its officers are state officials. 42 U.S.C. #1983 is unavailable to Siegel to assert his claims against them in federal court.

The eleventh amendment bars suits directly against the state or its agencies, regardless of the nature of the relief sought unless the state waives its immunity. Pennhurst State School & Hospital v. Holderman, 465 U.S. 89 (1984). The state or its agencies have not waived their immunity nor consented to this action to permit Siegel's suit against them in this forum. See, Moreno v. University of Maryland, 645 F.2d 217 (4th Cir. 1981), aff'd., 458 U.S.1 (1982).

Further, the United States

Supreme Court has specifically ruled that neither a state nor its officials acting in their official capacities are "persons" under #1983 further barring Siegel's suit. Will v. Michigan Dept. of State Police, 109 S. Ct. 2304 (1989).

A review of Siegel's complaint reveals that he is suing Parker Evatt and P. Douglas Taylor, in their official capacities as they acted pursuant to South Carolina law. Further, it is undisputed that the South Carolina Department of Corrections is created pursuant to South Carolina Code Annotated #24-1-30 (Law. Co-op. 1989), which statute provides that the Department of Corrections is an administrative agency of the State of South Carolina government. The statute states that the Department's function is to implement and carry

out the policy of the state with respect to its prison system. Sued in their official capacities, the Commissioner and Warden are state officials and while acting in their official capacities, they are in effect, alter egos of the State of South Carolina. Therefore, plaintiff's #1983 suit against the Department of Corrections and its officials is barred under Will.

Still immunity does not necessarily extend to a #1983 action for prospective declaratory or injunctive relief. Ex Parte Young, 209 U.S. 123, 58 S. Ct. 441 (1908). Construing the complaint liberally, it appears that Siegel may be requesting such relief. The Complaint request "a determination of the procedure of the South Carolina Department of Corrections accepting a

citizen and then returning same to Charleston County Sheriff." (Complaint Paragraph 5). Again, the plaintiff lacks standing to seek this relief and it appears this court lacks jurisdiction to hear it. As noted previously in the discussion of claims against William T. Howell, Article III, #2 of the Constitution limits the judicial power of the federal courts to adjudication of "cases" or "controversies." Existence of a case or controversy depends upon whether the person seeking relief has alleged a sufficient personal stake in the outcome to assure that the court will be called upon to resolve real issues between genuine adversaries rather than to merely give advisory opinions with respect to abstract or theoretical questions." Fowler

v. Alexander, 478 F. 2d 694, 696 (4th Cir. 1973), quoting Able v. Markle, 452 F.2d 1121, 1124 (2nd Cir. 1971).

From the face of the complaint, it is clear that Siegel is no longer incarcerated nor is the order of incarceration still in effect. Therefore, the plaintiff cannot show that he is in real, immediate danger of sustaining some direct injury as a result of the challenged official conduct and is, therefore, not entitled to declaratory or injunctive relief.

Accordingly, for the foregoing reasons, all defendants' motions to dismiss should be granted.

Respectfully submitted,

s/Robert S. Carr

United States Magistrate Judge

Charleston, South Carolina

August 5, 1991

The District did not move for an order of incarceration in front of Judge Howell. Instead, they prayed for "such sanctions as the court deems necessary to ensure compliance with the above noted orders and judgment". (District's Petition for Rule to Show Cause).

(Referenced at page 28-A)

APPENDIX "D"

UNITED STATES CONSTITUTION

ARTICLE III

Section 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-(between a State and Citizens of another State;-)* between Citizens of different States-between Citizens of the same State claiming Lands under Grants of different States, (and between a State, or the Citizens thereof, and foreign

States, Citizens or Subjects.)*

*Changed by the Eleventh Amendment.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

AMENDMENT XI

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

(Ratified Feb. 7, 1795)

APPENDIX "E"

UNITED STATES CONSTITUTION

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(Effective Dec. 15, 1791)

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

(Ratified Dec. 15, 1791)

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

(Ratified Dec. 15, 1791)

AMENDMENT VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

(Ratified Dec. 15, 1791)

AMENDMENT VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

(Ratified Dec. 15, 1791)

AMENDMENT IX

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

(Ratified Dec. 15, 1791)

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(Ratified July 9, 1868)

APPENDIX "F"

STATE OF SOUTH CAROLINA

ACTS AND JOINT RESOLUTIONS

STATUTES AT LARGE

Local and Temporary Laws-1961

ACT 498

An Act To Create The James Island Public Service District In Charleston County And To Provide That Bonds Of Such District May Be Issued In An Amount Not To Exceed One Hundred Thousand Dollars And To Provide For The Payment Of The Bonds.

SECTION 9. Penalties.-Any person, firm or corporation, wilfully failing or refusing to comply with any rule or regulation of the Commission promulgated or adopted under authority duly vested in it, after written notice of such rule or regulation and demand for compliance therewith, shall be guilty of a

misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding twenty-five dollars or imprisonment of not exceeding ten days; provided, that each day after conviction of such failure or refusal to comply that the same shall continue shall constitute a separate offence, and be subject to like punishment.

SECTION 10. Further.-It shall be unlawful for any person to wilfully injure or destroy, or in any manner hurt, damage, tamper with or impair any facility of the District, or any part of the same, or any apparatus or equipment incident thereto or used or useful in the operation of such facility, or to obtain water from its water distribution system or to connect to its sewers except in accordance with the regulations

promulgated by the Commission. Any person so offending shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than ten dollars nor more than one hundred dollars, or shall be imprisoned for not more than thirty days at the discretion of the court, and shall be further liable to pay all damages suffered by the District.

APPENDIX "G"

SOUTH CAROLINA CODE OF LAWS

(1976, as amended)

VOLUME 2 Annotated

MUNICIPAL CORPORATIONS

Local Government Provisions

Applicable to Special Purpose

Districts and other

Political Subdivisions

Article 7 Additional Powers of Special Purpose or Public Service District as to Sewage Collection and Disposal

§6-11-1210. Declaration of purpose.

..."It is the legislative intent of this article that it shall be deemed complementary and supplementary to existing laws relating to each such district and to add to the powers, functions and duties committed to the several governing bodies thereof in order that such

districts may fulfill their function of preserving the public health and provide for all those who own, use or occupy dwellings, commercial buildings or other structures therein. In enacting this law, the General Assembly exercises its general police powers having found that such exercise was necessary for the maintenance and preservation of the health of the inhabitants of the State. Nothing herein contained shall be construed to be in derogation of the powers of the Department of Health and Environmental Control".

§6-11-1250. Regulations may be enforced by courts.

"Paragraph (3) of §6-11-1230 authorizes any commission in the interest of the health of the district to adopt regulations requiring the use

of its sewer system and regulations generally with respect to the discharge of sewage and the use of privies, septic tanks and any other type of sewage facilities. Any commission is expressly authorized to apply to any court of general jurisdiction for the enforcement of any such regulations within the district governed by it through the means of mandatory injunction or other remedial process; provided such regulation has been duly adopted in the fashion prescribed by paragraph (3) of §6-11-1230."

§6-11-1260 Manner in which powers conferred shall be exercised; special acts superseded.

"The powers conferred herein shall hereafter be exercised by all commissions in the manner and to the extent hereinbefore set forth, and,

to that end, the provisions of this article shall supersede the analogous provisions of all special acts empowering commissions to exercise any of the powers herein before conferred".

APPENDIX "H"

JAMES ISLAND PUBLIC SERVICE DISTRICT

James Island, South Carolina

WASTEWATER COLLECTION SYSTEM

USE AND RATE RESOLUTION

Adopted March 26, 1979

ARTICLE I

Definitions

Section 1.13-Public Sewer shall mean a sewer in which all owners of abutting properties have equal rights and is controlled by the District.

ARTICLE II

USE OF PUBLIC SEWERS REQUIRED

Section 2.04-The owner of all houses, buildings, or properties used for human occupancy, employment, recreation or other purpose situated within this District and abutting on any street, alley, or right-of-way in which there shall be located a public sewer of the District is hereby

required at his expense to connect directly with the proper public sewer in accordance with provisions of this resolution within 90 days after written notice from the Commission to the property owner requiring such property owner to make connection thereto, provided that said sewer shall be within 300 ft. of the building and said connection to the public sewer shall be technically feasible without the pumping of sewage.

ARTICLE VIII

Penalties

Section 8.02 - Failure to comply with this resolution shall subject the person to a penalty of not less than $100 per day and payment of all damages incurred by the District's sewer system as a result of non-compliance.

ARTICLE IX

Validity

Section 9.02 - The commission reserves the right to take such immediate action for emergencies, not specifically covered herein, as it may deem necessary in the interest of Public Health and Safety and further reserves the right to amend this resolution, in part or in whole, whenever it may deem necessary, but such right will be exercised only in the manner established or prescribed for such matters, including but not limited to, public notice as required prior to final action.

EXHIBIT "I"

JAMES ISLAND PUBLIC SERVICE DISTRICT

COMMISSION-RULES OF PROCEDURE

June 9, 1980

Except: Page 8 RULE 20

Ordinances, resolutions, motions, regulations, contracts.

Page 10(i) All actions of the Commission shall be taken by resolution, except that any action of the Commission which provides for raising revenue, appropriating funds or incurring indebtedness, or which provides a penalty or establishes a rule or regulation for the violation of which a penalty is imposed, shall be by ordinance or regulation and except that approval of purely administrative matters may be accomplished by motion duly adopted and recorded in the minutes of the meeting.

APPENDIX "J"

SOUTH CAROLINA CODE OF LAWS

(1976, as amended)

CHAPTER 78

South Carolina Tort Claims Act

No. 463, eff. July 1, 1986

§15-78-10. Short title.

This chapter may be cited as the "South Carolina Tort Claims Act".

§15-78-20. Legislative findings; declaration of public policy; extent of, and construction of, waiver of immunity.

(a) The General Assembly finds that while a private entrepreneur may be readily held liable for negligence of his employees within the chosen ambit of his activity, the area within which government has the power to act for the public good has been without limit and, therefore, government did not have the duty to

do everything which might have been done...It is further declared to be the public policy of the State of South Carolina that to insure an orderly transition from sovereign immunity to qualified and limited liability that the General Assembly intends to provide for liability on the part of the State and its political subdivisions only from July 1, 1986, forward in prospective fashion...Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.

§15-78-30. Definitions.

(e) "State" means the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards,

divisions, instrumentalities, and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges.

(i) "Scope of official duty" means (1) acting in and about the official business of a governmental entity and (2) performing official duties.

§15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.

The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

§15-78-70. Liability for act of government employee; requirement that agency or political subdivision be named party defendant; effect of judgment or settlement.

(c) A person, when bringing an action against a governmental entity under the provisions of this chapter, must name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event that the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant; ...

APPENDIX "K"

SOUTH CAROLINA CODE OF LAWS

(1976, as amended)

TITLE 24

CORRECTIONS, JAILS, PROBATIONS,

PAROLES AND PARDONS

Chapter 3. STATE PRISON SYSTEM

§24-3-10 and §24-3-20

§24-3-10. General penitentiary and prison of State.

The Penitentiary at Columbia in Richland County shall be the general penitentiary and prison of the State, for the reformation as well as the punishment of all offenders, in which shall be securely confined, employed and governed, in the manner herein directed, all offenders who shall have been convicted and sentenced according to law to the punishment of solitary imprisonment or confinement therein at hard labor.

§24-3-20. Convicted persons shall be in custody of Board of Corrections; Board shall designate place of confinement; allowing prisoners to work at paid employment or participate in training programs; litter removal; authority to establish restitution program; judge to set maximum property loss for restitution program.

(a) Notwithstanding the provisions of §24-3-10, any person convicted of an offense against the State of South Carolina and committed to the State Penitentiary at Columbia shall be in the custody of the Board of Corrections of the State of South Carolina, and the Board shall designate the place of confinement where the sentence shall be served. The Board may designate as a place of confinement any available, suitable,

and appropriate institution or facility, including a county jail or prison camp, whether maintained by the State Department of Corrections or otherwise.

APPENDIX "L"

EXCERPT: TRANSCRIPT OF HEARING

BEFORE THE HONORABLE SOL BLATT

July 6, 1988

USDC #2:86-775-8

Charleston Co. #86-CP-10-0802

Wilburt A. Siegel vs

James Island Public Service District

The only violation of 1983 alleged is that the arrest, that an illegal warrant was taken out, which means that it was an unlawful arrest, the warrant being illegal because -- where did I have that. The warrant being illegal because the Statute was either a violation of the Constitution and the -- this case it would be the United States Constitution. Or the Act had been superseded and was of no -- was of no effect and they knew that.

Now, I've looked at the -- you

got all the Act 498. Insofar as the Act being superseded, I have read 6-11-1210, the first -- the last paragraph, speaking of the legislative intent. "It is the legislative intent of this article that it should be deemed complimentary and supplementary to existing laws relating to each such district and to add to the powers, functions and duties committed to the several governing powers thereof in order that such districts may fulfill their function of preserving the public health, etcetera.

Now, so its complimentary and supplementary to existing laws and its purpose is to add to the power of the governing bodies. That's the purpose of the Act. Well one involves -- one 6-11-12 -- I believe it is -- 1250 or 1260 -- 1250 involves

civil relief and 1260 says that this -- the powers herein shall supersede the analogous provision of all special acts.

Well, when you look at the legislative intent as expressed in 6-11-1210 and you look at 6-11-1250, 60, I don't believe, and I so hold, that 6-11-1210 and including 1250 and 1260, superseded 498. I think it's a supplement. One is a civil penalty -- one is a civil penalty and I don't think it's an analogous provision. Now if 498 had involved a civil penalty, 498 involved a civil penalty, and then I think that would be an analogous provision and it might very well have superseded.

I just use this as an illustration. If 49 -- if 611 -- 6-11-1210 F. 2d had provided to a method by -- I mean 498 had only

provided a fine of twenty-five dollars, a civil remedy and no criminal provision, and 6-11-1210 et. seq. had provided a way where they could have increased it from twenty-five to fifty or twenty-five -- up to two hundred, then I think that would have been an analogous provision and it would have been superseded. But I don't believe where you have one provision -- where you have the legislative intent expressed so clearly, it's only a supplemental to and enables and adds to the powers of the governing bodies.

I'm convinced that it didn't supersede 498. Now whether 498 is unconstitutional under the Federal Constitution -- so I hold as a matter of law, reading 498, 6-11-1210, 6-11-1250 and 6-11-1260 and the

regulation -- what is the regulation?

Mr. Kulp: 2.04

The Court: 2.04 is the civil.

Mr. Kulp: Well, the penalties are set forth in 8.02.

The Court: Well, that's all a part of the regulations that they referred to. When you read all of those, I'm convinced that 498 was not superseded and 498 is still in force and in effect, its constitutional.